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Nos. 86-642 and 86-669

In the Supreme Court of the United States

October Term, 1986

UNITED TRANSPORTATION UNION,
Petitioner,

vs.

W. G. TAYLOR, *et al.*,
Respondents.

MISSOURI PACIFIC RAILROAD COMPANY,
Petitioner,

vs.

W. G. TAYLOR, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Do the federal courts have subject matter jurisdiction to determine whether a provision in a collective bargaining agreement prohibiting a railroad operating employee from selecting the union to which he belongs to represent him in processing his claims and grievances and to appear with him at investigative hearings is invalid under the Railway Labor Act, 45 U.S.C. §§151 *et seq.*?

2. Whether the Railway Labor Act renders unenforceable exclusive grievance representation provisions which prevent a member of a union that meets the standards of the union shop requirements under an agreement entered into pursuant to 45 U.S.C. §152, Eleventh (c), from selecting his union, rather than the collective bargaining representative of the craft in which he is working, to represent him at investigations and in handling his grievances?

PARTIES INVOLVED

Petitioners are Missouri Pacific Railroad Company and United Transportation Union, the defendants-appellants below. Respondents are W. G. Taylor, K. P. Brockhoeft, A. J. Ruiz, Wayne A. Sepcich and Brotherhood of Locomotive Engineers.

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STATEMENT

Although the statements contained in the petitions of the Missouri Pacific Railroad Company ("MoPac") and United Transportation Union ("UTU") are essentially correct insofar as they draw from the opinions below, it needs

to be noted that MoPac has been in existence since 1917 *Moody's Transportation Manual*, p. 162 (1985). During that period, the petitioner UTU, and its predecessors prior to 1969, have been the collective bargaining representatives for the crafts of firemen (helpers), conductors, trainmen and switchmen.[1] Respondent Brotherhood of Locomotive Engineers ("BLE") has represented the craft of locomotive engineers. In fact, BLE is the collective bargaining representative for the craft of locomotive engineers on almost all of the nation's railroads and is a national railway labor organization which admits to membership employees in engine, train, yard and hostler service within the meaning of Section 2, Eleventh (c) of the Railway Labor Act ("RLA"), 45 U.S.C. §152, Eleventh (c).

As such, BLE is qualified to appoint two labor members on the First Division of the National Railroad Adjustment Board pursuant to Section 3, First of the RLA. UTU also opens its membership to employees in the crafts of engineers, firemen (including hostlers),[2] conductors,

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1. Railroad employees are organized on a craft basis. *See Switchmen's Union v. NMB*, 320 U.S. 297 (1943); 45 U.S.C. §152, Ninth. "Operating employees" are those employees involved in the movement of the locomotive units and their train consist, and comprise five crafts that are further called "engine service" employees (engineers and/or firemen) and "train service" employees (conductors, trainmen and switchmen).

2. On October 31, 1985, UTU entered into a national agreement with the National Railway Labor Conference, which is the negotiating arm of the nation's railroads, to eliminate the craft of firemen and eventually to replace them as the source of supply for engineers with train service employees. The preface of Article XIII of that agreement reads:

> "The craft or class of firemen (helpers) shall be eliminated through attrition except to the extent necessary to provide the source of supply for engineers and for designated passenger firemen, hostler and hostler helper positions. Trainmen shall become the source of supply for these positions as hereinafter provided."

(Continued on following page)

trainmen and switchmen. Therefore, it likewise is qualified to appoint the two other labor members on the First Division. The First Division has jurisdiction to hear and resolve all grievances and claims of railroad employees in the operating crafts—the crafts exclusively represented by BLE and UTU on the nation's railroads.

Moreover, membership in either BLE or UTU by an operating employee statutorily fulfills any union shop requirement negotiated by BLE or UTU as representative of any operating craft, even though the other union is not a craft representative on the employing rail carrier. *Birkholz v. Dirks,* 391 F.2d 289 (7th Cir. 1968); *O'Connell v. Erie Lackawanna R.R.,* 391 F.2d 156 (2d Cir. 1968). *See also,* 45 U.S.C. §152, Eleventh. As Section 2 of the UTU-MoPac Union Shop Agreement for the craft of switchmen provides, the requirements of membership in UTU, in the particular instance, shall be satisfied "if said employee should hold or acquire membership in any one of the labor organizations national in scope, organized in accordance with the Railway Labor Act and admitting to membership employees of a craft or class in any of said services." (Affidavit of M. L. Royal, ¶3, which is attached as Appendix A, A2-A3). And UTU agrees that trainmen and engineers satisfy their union shop agreements by belonging to either UTU or BLE (Exhibit C to Affidavit of W. J. Wanke, which is attached as Appendix B, A13-A15).

BLE has never objected to UTU representing its members in the processing of any claims arising under the BLE collective bargaining agreements on MoPac through

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Footnote continued—

Thus, if the UTU-MoPac reading of the RLA were accepted, it would have the absurd result of sanctioning UTU to represent all operating employees in the grievance-arbitration machinery, and limit BLE to its locomotive engineer members.

the grievance machinery specified in those contracts. And until this case, UTU had never objected to BLE representing its members in the processing of any claim arising under a UTU labor contract, notwithstanding the exclusive representation language therein.

W. G. Taylor and the three other individual respondents are employed by MoPac at its Avondale, Louisiana Yard. They are switchmen and also are locomotive engineers or hold promotion and work rights in that craft. As switchmen on MoPac they for years have had first preference to transfer into the engine service crafts and ultimately promotion into and seniority within the engineers' craft (See also fn. 2, *supra*). Thus, when Taylor and other switchmen working as engineers are unable to work in the latter craft, they flow back as firemen or switchmen until their seniority again permits them to work as engineers (Royal Affidavit, ¶2, Appendix A, A2). All of the individual respondents are members of BLE (*Id.* ¶6, App. A, A4).

Shortly after January 1, 1984, the respondents Taylor, Ruiz and Sepcich were charged with misconduct. They sought to have BLE's local chairman act as their representative at the investigative hearing scheduled for February 8, 1984, but MoPac refused to permit them to be represented by anyone other than an officer of UTU. The investigation was held without the employees having their requested representation (*Id.* ¶8, App. A, A4-A5).

On other occasions, other members of BLE, including the respondents sought BLE representation regarding their claims and grievances. In each instance, MoPac refused to allow BLE to handle its members' claims and to submit those matters for arbitration provided by public law boards

pursuant to Section 3, Second of the RLA, 45 U.S.C. §153, Second[3] (*Id.* ¶10, App. A, A5).

In support of its denial of each employee's request for BLE assistance, MoPac relied upon the provisions of its bargaining agreement with UTU, including Articles 18 and 23, which limit and restrict appearances at investigations and in the handling of claims and grievances to the "duly accredited representative of the UTU." (MoPac Pet. App. B at 22a-24a).

The complaint was filed on February 6, 1984, to enforce the rights of the employees to have their disciplinary cases and grievances handled by BLE as their selected representative and for BLE to handle their disciplinary matters and any other claims at arbitration before special boards of adjustment (sometimes called "Public Law Boards") created in accordance with Section 3, Second of the RLA, 45 U.S.C. §153, Second.

MoPac moved to dismiss for lack of subject matter jurisdiction, which was opposed by both UTU and the respondents. The motion was denied on August 22, 1984. Both petitioner UTU and respondents filed motions for summary judgment, and MoPac opposed both on the same jurisdictional grounds. However, on March 20, 1985, the district court granted summary judgment for the employees and BLE (MoPac Pet. App. B, 10a-26a).

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3. Section 3, Second, in pertinent part, provides that if "written request is made upon any individual carrier by the *representative of any craft or class of employees of such carrier* for the establishment of a special board of adjustment * * * the carrier or representative upon whom such request is made shall join in an agreement establishing such a board within thirty days from the date such request is made." (Emphasis supplied). BLE meets the standard set out in the italicized language.

The district court rejected MoPac's jurisdictional objections, because the case did not present a dispute regarding the jurisdiction of competing unions as to which the National Mediation Board has exclusive jurisdiction under Section 2, Ninth of the RLA[4] in that "this case presents no issue about UTU's authority to make agreements with MOPAC relating to the working conditions, rules, and pay of MOPAC switchmen." (MoPac Pet. App. B at 13a). In addition, the trial court held that the matter did not involve a "minor dispute" regarding the interpretation or application of a collective bargaining agreement provision since "the parties agree that the challenged provisions of the UTU/MOPAC agreements purport to create an exclusive right of UTU to represent switchmen at all MoPac company level proceedings." (*Id.*)

In holding that it had jurisdiction, the district court said:

> "Since the issue is one of validity, not interpretation, it is for judicial consideration. *See Felter v. Southern Pacific Co.*, 359 U.S. 326, 327 n.3, 79 S. Ct. 847, 850 n.3 (1959); *Order of Railway Conductors & Brakemen v. Switchmen's Union of North America*, 269 F.2d 726 (5th Cir. 1959). Nothing in the RLA restricts the Court's jurisdiction to determine whether the exclusive representation provisions of the UTU/

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4. Section 2, Ninth, 45 U.S.C. §152, Ninth, authorizes the Mediation Board "to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier." In other words, this provision gives the NMB exclusive jurisdiction to investigate and certify the craft representative for purposes of negotiating rates of pay, rules, and working conditions.

MOPAC agreements are valid." (MoPac Pet. App. B, 13a-14a).

Following the lead case in this area, *McElroy v. Terminal R.R. Ass'n of St. Louis*, 392 F.2d 966 (7th Cir. 1968), *cert. denied*, 393 U.S. 813 (1969), the district court ruled as follows on the merits:

> "Reading the language of the Act 'not in a vacuum, but in the light of the policies [it] was intended to serve,' *Pennsylvania R.R. Co. v. Rychlik*, 352 U.S. 480, 488, 77 S. Ct. 421, 425 (1957), we conclude that under the Act the individual plaintiffs are entitled to designate their union, BLE, to represent them in company level proceedings notwithstanding the UTU/MOPAC agreements to the contrary. We hold that the Act renders null and unenforceable the exclusive representation provisions of the UTU/MOPAC agreements insofar as they prevent a member of a railway union from selecting his own union rather than the bargaining representative union of the craft in which he is working to assist him at company level proceedings." (*Id.*, at 15a).

Judgment was eventually entered for the employees on August 8, 1985, after the claim for damages was waived (MoPac Pet. App. A, 3a). On appeal, the United States Court of Appeals for the Fifth Circuit affirmed (MoPac Pet. App. A at 1a-9a).

Like the district court, the Fifth Circuit held that neither the Adjustment Board nor the NMB had jurisdiction, for "the pertinent contractual provisions, reprinted in 614 F. Supp. at 1325-26, are clear and unambiguous and require no interpretation," (MoPac Pet. App. A, 4a) and there was no dispute "to implicate UTU's bargaining

position" and, therefore, to create "a representation dispute within the NMB's exclusive jurisdiction." Rather the Court of Appeals said that the issue specifically was "[w]hether a provision of a collective bargaining agreement is valid," which is "classic grist for the judicial mill." (*Id.* at 5a).

After looking at the language of the RLA, its goals and pertinent congressional testimony and after noting its decision accords "with the holdings or leanings of our colleagues in the Seventh, Eighth, and Tenth Circuits," the Fifth Circuit affirmed and said:

> "The individual, in such an instance [particular disciplinary or grievance hearing], would have a vital interest; that individual is the employee 'interested in the dispute.' The individual should be permitted to select his or her representative. Only in that manner would the heralded right to free selection of union membership be accorded the status and dignity explicit and implicit in the relevant statutes." (MoPac Pet. App. A, 9a).

REASONS FOR DENYING THE WRIT

This case involves no question that is significant for review by this Court. Clearly, Section 2, Second, Third and Sixth and Section 3, First (j) of the RLA grant operating employees the right to choose the union in which they hold membership to act in their behalf in investigation hearings and in processing their claims and grievances. As held by the Seventh Circuit in *McElroy v. Terminal R.R. Ass'n of St. Louis*, 392 F.2d 966, 969 (7th Cir. 1968), *cert. denied*, 393 U.S. 813 (1969), the RLA "guarantees an individual employee the right to

prosecute his grievance through any representative he may designate."

The legislative history of the RLA shows that employees without question have always had the right to be represented in grievance matters by the union to which they belong. *See Hearings Before House Committee on Interstate and Foreign Commerce on the Railway Labor Act*, H.R. 7650 (73rd Cong., 2d Sess.) at 44,89. Moreover, this Court has held that an employee's claims or grievances are his own to be handled independently by him or through the representative of his choosing, and cannot be interfered with by the carrier and/or the bargaining representative for the craft. *Elgin, J. & E. Ry. v. Burley*, 325 U.S. 711 (1945), *aff'd on reh.*, 327 U.S. 661 (1946) ("*E.,J.& E.* case").

Following this Court's opinion in the *E.,J.& E.* case, then Attorney General Tom C. Clark entered an opinion that the RLA guarantees the right of the railroad employee to prosecute his grievance personally or through any representative he may designate, including a minority union. 40 *Op. Att'y Gen.* 494, at 495 (1946). *See also McElroy v. Terminal R.R. Ass'n of St. Louis, supra; General Committee v. Southern Pacific Co.*, 132 F.2d 194, 201 (9th Cir. 1942), *reversed on other grounds*, 320 U.S. 338 (1943); *Douds v. Local 1250, Retail, Wholesale & Department Store Union*, 173 F.2d 764 (2d Cir. 1949).

The doctrine of individual choice in grievance handling by railroad operating employees is further substantiated by Section 2, Eleventh (c) of the RLA, which permits all operating employees to satisfy the union shop requirements of any compulsory union membership agreement by membership in either BLE or UTU. *Pennsylvania R.R. v. Rychlik*, 352 U.S. 480 (1957); *O'Connell v.*

Erie Lackawanna R.R., 391 F.2d 156 (2d Cir. 1968); *Birkholz v. Dirks*, 391 F.2d 289 (7th Cir. 1968). In addition, the Eighth Circuit and the Tenth Circuit, in *United Transportation Union v. Burlington Northern, Inc.*, 563 F.2d 1279 (8th Cir. 1977) and *Brotherhood of Locomotive Engineers v. Denver & Rio Grande Western R.R.*, 411 F.2d 1115 (10th Cir. 1969), concluded that UTU, in those cases the minority union, could require the employing railroad to set up a Public Law Board to handle its members' grievances and discipline matters, even though the claims arose in a craft for which the UTU was not bargaining representative and the employees involved had no likelihood of ever working in a UTU represented craft.

Also, in respect to MoPac's assertion relative to jurisdiction, there is no significant issue which needs the attention of this Court. As a question of contract validity, the issue is solely one for judicial consideration, not arbitration by the National Railroad Adjustment Board or by a Public Law Board under Section 3 of the RLA. *See, e.g., Brotherhood of R.R. Trainmen v. Howard*, 343 U.S. 768, 774 (1952); *Felter v. Southern Pacific Co.*, 359 U.S. 326 (1959). Nor does the dispute constitute "a representation dispute within the NMB's exclusive jurisdiction." (MoPac Pet. App. A, 5a). Not only does everyone concede that UTU is the bargaining representative for switchmen with authority to negotiate the labor contract for the switchmen craft as a whole so that nothing involved in this case can purport to be a jurisdictional or representational dispute, but the National Mediation Board has no adjudicating authority or the power to fashion relief in a case of this nature, nor has that Board been given the function of interpreting the RLA. *See Detroit & T. S. L. R.R. v. United Transportation Union*, 396 U.S. 142, 158-159 (1969).

Therefore, contrary to petitioners' assertions, the decision below is not in conflict with any decision of the other courts of appeals and presents no question under the RLA which merits this Court's review. Moreover, the decision is consistent with the holdings of this Court and the applicable provisions of the RLA and their legislative history.

I. THE RULING BELOW RELATIVE TO SUBJECT MATTER JURISDICTION WAS NOT ERRONEOUS AND DOES NOT PRESENT A SIGNIFICANT ISSUE.

It is well-settled that the statutory commands under the RLA are not mere exhortations but are enforceable in the courts. This doctrine was first announced in *Texas & N.O. R.R. v. Brotherhood of Ry. & S.S. Clerks,* 281 U.S. 548 (1929), which upheld the issuance of an injunction prohibiting a carrier from interfering with its employees' rights to organize and from promoting a company union. Later, in *Virginian Ry. v. System Fed. No. 40,* 300 U.S. 515 (1937), the Court detailed the powers of the federal courts to fashion equitable relief to enforce the RLA's statutory commands in upholding the issuance of relief against a carrier that refused to bargain with the certified craft representative and had attempted to defeat its majority status. In accordance with those decisions, respondents requested enforcement of rights under Sections 2 and 3 of the RLA, and the Courts below fashioned equitable relief enforcing those commands.

Further, the question of the legality of the UTU-MoPac exclusive representation provision was properly for the courts to decide and is not one for Adjustment Board consideration. This Court has decided that contract validity questions are for the courts and not for the Adjustment

Board. *Brotherhood of R.R. Trainmen v. Howard,* 343 U.S. 768, 774 (1952); *Felter v. Southern Pacific Co.,* 359 U.S. 326, at 327 n.3 (1959). *See also Order of Ry. Conductors & Brakemen v. Switchmen's Union,* 269 F.2d 726 at 729 (5th Cir. 1959) ("the case poses a genuine issue as to validity, not interpretation, so that on these and other authorities, it is one for judicial consideration.") Also, where the Adjustment Board cannot provide the relief sought, as here, the Court has decided that the need for judicial intervention is itself sufficient to confer jurisdiction on the courts, even if contract interpretation questions were involved, which we do not suggest remotely exists in this case. *See Glover v. St. Louis - S.F. R.R.,* 393 U.S. 324, 329 (1969).

Finally, the courts below correctly rejected the contention of MoPac that the dispute is a jurisdictional one within the jurisdiction of the NMB. As a reading of Section 2, Ninth of the RLA, 45 U.S.C. §152, Ninth, reveals, the NMB has jurisdiction only to determine through an election the certified representative of a craft or class of employees. That section of the Act and the NMB have nothing whatsoever to do with the selection of the individual's grievor or his choice of the person or the union that he wishes to represent him in the grievance-arbitration procedures. Respondents throughout the proceeding have conceded that UTU is the bargaining representative for the craft of switchmen on MoPac. They also concede that neither they nor the grievance handler chosen by them can negotiate the rates of pay, rules, or working conditions for the switchmen craft as a whole, and they are not seeking to infringe upon UTU's authority in that respect. There is simply nothing involved in this case that can be perceived to be a jurisdictional or representational dispute. Accordingly, the principle that the NMB has ex-

clusive jurisdiction to resolve representational disputes, which the Court enunciated in the 1943 Trilogy of *Switchmen's Union v. NMB,* 320 U.S. 297; *General Committee v. Missouri-Kansas-Texas R.R.,* 320 U.S. 323; and *General Committee v. Southern Pacific Co.,* 320 U.S. 338, is inapplicable. Simply put, as this Court said in *Detroit & T.S. R.R. v. United Transportation Union,* 396 U.S. 142, at 158 (1969), "the Mediation Board has no adjudicating authority. . .," nor could it grant any relief in this situation.

II. THE DECISION BELOW CONFORMS WITH THE APPLICABLE STATUTORY LANGUAGE AND ITS LEGISLATIVE HISTORY

A. The RLA Provides That An Employee May Select His Own Representative For Handling His Claims.

The RLA provision applicable to company-level proceedings is Section 2, Second of the RLA, 45 U.S.C. §152, Second, which provides that claims and grievances shall be considered "in conference between *representatives designated* and authorized so to confer, respectively, by the carrier or carriers and *by the employees thereof interested in the dispute.*" (Emphasis supplied). As stated by the Seventh Circuit in *McElroy v. Terminal R.R. Ass'n of St. Louis,* 392 F.2d 966, at 969 (7th Cir. 1968), *cert. denied,* 393 U.S. 813 (1969), "on its face, this provision guarantees an individual employee the right to prosecute his grievance through any representative he may designate."

If this were not sufficient to establish the point, Section 2, Third, 45 U.S.C. §152, Third, permits employees to designate representatives without interference from the carrier, and establishes that the representatives of

those employees need not be employees of the carrier. Section 2, Sixth, 45 U.S.C. §152, Sixth, permits individual employees or their fellow employee representatives to confer with management during working hours and without loss of pay. And in Section 3, First (j), Congress acknowledged the employee's right to choose any representative to act in his behalf in presenting "minor disputes," *i.e.*, disputes which concern grievances and contract interpretation questions before the National Railroad Adjustment Board or Public Law Boards.

Petitioners attempt to read the provisions of the RLA to grant the recognized or designated bargaining representative exclusivity in all matters, whether "major" or "minor." However, if one reads Sections 2 and 3 completely, the draftsmen of the RLA knew when and how to refer to the representative of the craft determined by the majority. That terminology is used only in Section 2, Fourth in reference to collective bargaining and in Section 2, Ninth relative to the representation elections held by the NMB to determine the bargaining representative for the craft. In all provisions having reference to individual rights or the handling of minor disputes, the RLA refers to "representatives designated by the employees interested in the dispute."

Relying upon the purposes of the RLA, particularly the freedom of association specified in 45 U.S.C. §151a, the Court of Appeals appropriately concluded:

> "The district court's decision manifestly is consistent with the stated goals of the RLA. Only specific language of the RLA would warrant rejecting the trial court's findings and conclusion. We have been cited to no such language, and find none" (MoPac Pet. App. A, 8a).

B. The Legislative History Of The RLA Shows That Employees Have Always Had The Right To Be Represented By Minority Unions In Grievance Matters.

In the hearings on the RLA before the House Committee on Interstate and Foreign Commerce, Commissioner Joseph B. Eastman, who had control of the nation's railroads for the federal government, was asked whether an individual or a group of individuals, not belonging to the craft representative, could present their grievances directly to the management. He responded:

> "[T]he old Railroad Labor Board . . . covered that point in the following language. I take this from the opinion of the Supreme Court in *Pennsylvania Federation v. Pennsylvania Railroad Company* (267 U.S. 203), in which this rule laid down by the board is quoted:
>
> 'The majority of any craft or class shall have the right to determine which organization shall represent members of such craft or class. Such organization shall have the right to make an agreement which shall apply to all members of such craft or class. *No such agreement shall infringe, however, upon the right of employees not members of the organizations representing the majority to present grievances either in person or by representatives of their own choice.*'" *Hearings Before House Committee on Interstate and Foreign Commerce on the Railway Labor Act* (73rd Cong., 2d. Sess.), pp. 44. (Emphasis supplied).

In contravention of the exclusivity argument raised by petitioners, Commissioner Eastman stated:

> ". . . When it comes to collective bargaining in the matter of wages and working conditions, it seems to me plain that a company ought not be compelled to deal with more than one organization. It ought not to have to make bargains with two or three different organizations. *But when it comes to the presentation of grievances, that is a different matter, and certainly an individual employee ought not be stopped in any way from taking his grievance up directly with management, and I think that ought to apply to any other group of employees.*" *Id.* (Emphasis supplied).

George Harrison, Chairman of the Railway Labor Executives' Association and President of the Brotherhood of Railway Clerks, also testified that the majority representation features of the RLA were not intended to, and did not prevent individuals involved in grievances "from having representatives to handle their grievances that are not representatives of the majority." *Id.*, 89. In the same vein, he stated that the language contained in Section 3, First (j) applies to "the balance of the act in connection with grievances . . . just as it reads, where the individual may in person or by counsel of his own choosing of [sic] other representative, prosecute his grievances." *Id.*

In sum, the authors of the RLA intended that individual employees, like the individual respondents, would be able to use a minority union to process their grievances, and the language of the Act expresses that intent.

III. THERE IS NO CONFLICT WITH THE HOLDINGS OF THIS COURT OR THE DECISIONS OF THE OTHER CIRCUITS

In *Elgin, J. & E. Ry. v. Burley*, 325 U.S. 711 (1945), *aff'd on reh.*, 327 U.S. 661 (1946), the Court determined

that individual employees have the right to present their grievances to the National Railroad Adjustment Board and that the craft representative could not settle or withdraw them without the employee's consent. Finding the employee's grievances and claims are his own, the Court therefore held that "the individual employee's rights cannot be nullified merely by agreement between the carrier and the union." The Court said that these "are statutory rights which [the employee] may exercise independently or authorize the union to exercise in his behalf." 325 U.S. at 740 n.39.

On September 20, 1946, then Attorney General Tom C. Clark advised the President, in response to an inquiry from the National Mediation Board, that the *E.,J.& E.* case stressed that the RLA "obviously contemplates that an employee may personally present his own grievance to the management" and, thereby, the RLA "guarantees to the individual employee the right to prosecute his grievance personally or through any representative he may designate." 40 *Op. Att'y Gen.* 494, at 495 (1946). Justice Clark in summarizing his conclusions, said:

> "The agreement, however, under the decision of the Supreme Court in the *Elgin* case, cannot legally preclude an aggrieved employee from also negotiating with the carrier, personally or through an individually chosen representative, for the settlement of his grievance. *He may designate as his representative the union holding the contract or any other union or person otherwise qualified to act. He may negotiate, personally or by representative, whether or not the collective representative determines to pursue this matter.* And the settlement of the grievance, to be binding on the individual employees, must have been

authorized by him." (*Id.*, 499-500). (Emphasis supplied).

The various courts of appeals have uniformly ruled that a railroad employee can choose his own representative for processing his claims and grievances. In so ruling, the Ninth Circuit, rejecting the argument that only the bargaining representative for the craft could handle claims or grievances arising out of the collective bargaining agreement for that craft, said in response to a like argument of petitioner UTU that "[i]t is only with reference to craft organization and collective bargaining, that is, craft action, that a union chosen as a representative must be chosen by the majority." *General Committee v. Southern Pacific Co.*, 132 F.2d 194, 199 (9th Cir. 1942), *reversed on other grounds*, 320 U.S. 338 (1943). Based upon similar reasoning, the Fifth Circuit concluded in *Estes v. Union Terminal Co.*, 89 F.2d 768 (5th Cir. 1937), that the federal courts have jurisdiction to insure that a railroad employee receives notice of an arbitration proceeding, the award of which may affect his employment status, in order to permit the employee to choose his own representative in prosecuting his interests. More recently, the Sixth Circuit reached a similar result in *Meeks v. Illinois Central Gulf R.R.*, 738 F.2d 751 (6th Cir. 1984).

Any doubt about the issue in the railroad industry would seem to have been fully answered by the decision of the Seventh Circuit in *McElroy v. Terminal R.R. Ass'n of St. Louis*, 392 F.2d 966 (7th Cir. 1968), *cert. denied*, 393 U.S. 813 (1969). In that case, one of UTU's predecessors found the shoe to be on the other foot. BLE had made an explicit agreement with the railroad that it alone would be the union representative in contract enforcement under the BLE contract for engineers. As

here, the railroad refused to allow UTU's predecessor to handle grievances of engineer employees in enforcement of the engineers' contract, and to appear for those persons at investigative hearings. The Seventh Circuit struck down the exclusive representation provisions contained in the BLE agreement as being in violation of the rights afforded the individual employees under Sections 2 and 3 of the RLA.

The Seventh Circuit rejected its decision in *Broady v. Illinois Central R.R.*, 191 F.2d 73 (7th Cir. 1951) and the decision of the Eighth Circuit in *Butler v. Thompson*, 192 F.2d 831 (8th Cir. 1951), along with several others. Petitioners suggest that the named decisions establish a conflict with the Seventh Circuit's decision in *McElroy*. However, the Seventh Circuit appropriately found those cases to be inapposite or not applicable to operating employees. Factually, those cases did not involve employees who have promotion and work rights in multiple crafts, employees who may satisfy their union shop requirements by membership in a "minority" union, unions covered by Section 2, Eleventh (c) of the RLA, and unions qualified to represent employees in any craft or class of employees subject to the jurisdiction of the First Division of the National Railroad Adjustment Board. Rather those cases involved employees outside the coverage of Section 2, Eleventh (c) who did not belong to the "recognized unions," and who, in most instances, were seeking to set aside unfavorable grievance-arbitration decisions, after entry thereof, by challenging the procedures through which they were reached. In addition, in *Broady v. Illinois Central R.R., supra*, the Seventh Circuit was never apprised of the passage of Section 2, Eleventh of the RLA or of the effect of this Court's decision in the *E.,J.& E.* case.

Petitioners also attempt to portray a conflict in the lower courts on this issue by comparing *Coar v. Metro-North Commuter R.R.*, 618 F. Supp. 380 (S.D. N.Y. 1985), which held that railroad employees have a choice of representation at company-level proceedings, with *Landers v. Nat'l Railroad Passenger Corp.*, ... F. Supp. ..... (D. Mass. 1986). (See UTU Pet. App. D.) The district court in *Coar* ruled in the same manner that the trial court in this case did and basically adopted the opinion of the district court below with additional emphasis upon quotations from the legislative history of the 1934 RLA in which the draftsmen testified that the grievants may have "representatives to handle their grievances that are not representatives of the majority." *Coar v. Metro-North Commuter R.R., supra,* 618 F. Supp. at 383. The district court in *Landers,* however, had before it a much different case from that at bar. And the court relied upon the severe factual distinctions in concluding that "plaintiff cannot prevail on his argument that he has a right to be represented by his own union because that is the usual manner in which disputes have been resolved by Amtrak and its passenger engineers." (UTU Pet. App. D, 4-b). In *Landers,* the court relied upon the facts that Amtrak is a relatively new passenger carrier; that it did not begin employing passenger engineers until January 6, 1983; that the exclusive representation rule has been in effect from the start-up date; that the practice under that agreement "has consistently been to allow only the collective bargaining agent to act as an employee's representative;" that "representation by an employee's own union is not the usual manner of dispute resolution between Amtrak and its passenger engineers;" and that any shuttling between crafts by Amtrak locomotive engineers is "not shuttl[ing] between two crafts represented by two

different unions but between two crafts represented by the same union." (UTU Pet. App. D, 4-1).

Petitioners also rely upon the Fifth Circuit's decision in *Hughes Tool Co. v. NLB*, 147 F.2d 69 (5th Cir. 1945), the philosophy of the NLRB, and the expressions of several legal commentators as to the application of the National Labor Relations Act, 29 U.S.C. §§141 *et seq.* None of those references dealt with a reading of the RLA. This Court has frequently emphasized that parallels between the two Acts are precarious at best and, in most instances, are not appropriate. *Chicago & N. W. R.R. v. United Transportation Union*, 402 U.S. 570, at 579 n.11 (1971).

The Court in *Hughes Tool* did, in fact, find that the NLRB correctly held that grievance handling is not collective bargaining for the whole unit, which is restricted to the collective bargaining agent. 147 F.2d *supra*, at 72. The Fifth Circuit also held that individuals and groups of employees could fully prosecute their grievances through all stages and appeals. However, it refused to extend the employee's choice to a rival union, because in its judgment, Section 9(a) of the NLRA, 29 U.S.C. §159(a), did not intend that a rival union would be able to present grievances. The basis for this view was the fact that when the proviso was before Congress, a proposal to add the words "through repesentatives of their own choosing" was rejected. *But see Douds v. Local 1250, Retail, Wholesale & Department Store Union*, 173 F.2d 764 (2d Cir. 1949). The differing legislative history and language of the RLA, however, allow employees to designate a minority union to represent them in grievance and claims handling.

The union membership choice cases under the RLA further establish the consistency of the decisions below

with the general principles applicable to railroad operating employees. What point would there be in the broad protection for BLE membership provided by Section 2, Eleventh (c), if the most critical benefit of membership, grievance representation, can be wiped out by agreements between UTU and MoPac? Surely the membership protection of Section 2, Eleventh (c) must be a meaningful one, not subject to obliteration by removal of the rights of membership, rights long accepted in the industry and known to Congress when Section 2, Eleventh (c) was enacted in 1951. The history of this legislation and the membership protections therein are well chronicled in several cases. *Pennsylvania R.R. v. Rychlik*, 352 U.S. 480 (1957); *O'Connell v. Erie Lackawanna R.R.*, 391 F.2d 156 (2d Cir. 1968).

And Section 3, Second of the RLA, 45 U.S.C. §153, Second, which sets forth the Public Law Board arbitration procedures provided for by the 1966 amendments to the RLA, has also been read to permit a minority union (UTU in both cases) to handle contract grievances for its members employed in a craft represented by BLE. In ruling that the minority union could take its members' grievances to a public law board, the Eighth Circuit has stated:

> "In disputes arising out of collective bargaining agreements, other than merger protective agreements, an employee not only has a right to be represented by the union of his choice, but also has a right to have his union representative sit on the arbitration panel deciding the case. The employee has the right, even though the contract being construed was negotiated by a rival union and even though precedents established by the rival union and the railroad are to be followed." *United Transportation Union v. Burlington Northern, Inc.*, 563 F.2d 1279, at 1284 (8th Cir. 1977).

A similar conclusion was reached by the Tenth Circuit in *Brotherhood of Locomotive Engineers v. Denver & Rio Grande Western R.R.*, 411 F.2d 1115 (10th Cir. 1969).

Simply put, the decision below conforms with the well-established precedent on this issue, and there is no basis under the RLA for petitioners' expressions.

IV. THE PETITION DOES NOT RAISE ANY IMPORTANT QUESTION THAT NEEDS TO BE ADDRESSED BY THE COURT

Petitioners' final claim is that the decision below "frustrates industrial self-government and labor harmony," "will result in labor chaos," and "eviscerate the collective bargaining process in the railroad industry." (MoPac Pet. 16). This claim is based on an erroneous view of what the Court of Appeals decided in this case. For example, the Fifth Circuit clearly stated:

> "The right to associate freely with a national union of an employee's own choosing, and the effects of the exercise of that right, however, are not unlimited. In the instant case, for example, the BLE switchmen are not entitled to have BLE negotiate a separate collective bargaining agreement for them; rather, the terms and conditions of their employment necessarily are governed by the MOPAC-UTU agreement covering switchmen. *See, e.g., Steele v. Louisville & N.R. Co.*, 323 U.S. 192 (1944). On the other hand, given the apparent importance Congress attached to freedom of choice, that right should be limited only when compelled by express language of the RLA. We find neither statutory language mandating such a result nor compelling reason to limit the right of free choice in the instant case." (MoPac Pet. App., 7a).

In anticipation of petitioners' argument, the Fifth Circuit concluded: "We further note that our holding today creates no conflict between the RLA policy of freedom of union choice for the employee and the stated goals of company-level settlement of disputes, 45 U.S.C. §152 First, and the transcending desire for labor-management stability." (MoPac Pet. App., 9a). Thus, the holding of the Court of Appeals does not negate the collective bargaining process or frustrate industrial self-government. The majority representative negotiates the agreement and its interpretation is placed upon that agreement in the grievance-arbitration process.

Moreover, the scheme of membership choice and representation in the railroad operating crafts is a fine tuned one that has served well for over fifty years. Throughout those years, the lack of exclusivity in the operating crafts has not led to chaos or lack of uniformity in application of agreements. MoPac has lived with that system, so it is difficult to understand its qualms at this point in time. For over 35 years, operating employees have belonged to any union, national in scope, and admitting those persons into its membership that choose to join. Yet no one has claimed that this fostering of minority unions has eviscerated the collective bargaining process in the railroad industry. The fathers of the RLA incorporated the procedures prevailing in 1934 to permit any union to represent an employee at all stages of the grievance-arbitration process. These procedures continued through 1966, and were reaffirmed by Congress in the amendments to Section 3, Second. None of the dire events predicted by petitioners has ever arisen.

Accordingly, the determination raises no issue involving federal railway labor policy which warrants review by this Court.

CONCLUSION

For the foregoing reasons the petitions should be denied.

Respectfully submitted,

HAROLD A. ROSS
(Counsel of Record)
ROSS & KRAUSHAAR CO., L.P.A.
1548 Standard Building
1370 Ontario Street
Cleveland, Ohio 44113
(216) 861-1313
Counsel for Respondents

APPENDIX

APPENDIX A

Affidavit of M. L. Royal

Civil Action No. 84-700

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
Section "H"
Magistrate Division 2

W. G. TAYLOR, K. P. BROCKHOEFT, A. J. RUIZ, WAYNE A. SEPCICH and BROTHERHOOD OF LOCOMOTIVE ENGINEERS,
Plaintiffs,

vs.

MISSOURI PACIFIC RAILROAD COMPANY and UNITED TRANSPORTATION UNION,
Defendants.

AFFIDAVIT OF M. L. ROYAL

STATE OF TEXAS)
) SS:
COUNTY OF BOWIE)

M. L. ROYAL, being first duly sworn, deposes and says:

(1) I am, and have been since 1971, General Chairman of the General Committee of Adjustment, Brotherhood of Locomotive Engineers, on the Missouri Pacific Railroad Company-Former Texas & Pacific (hereinafter "MoPac"), Texas Pacific-Missouri Pacific Terminal Rail-

road and Fort Worth & Denver Railway. The offices of the General Committee are located at Room 112 Cervini Building, 1001 Texas Boulevard, Texarkana, Texas 75501. This affidavit is made in support of the motion for summary judgment submitted by W. G. Taylor, K. P. Brockhoeft, A. J. Ruiz, Wayne A. Sepcich and the Brotherhood of Locomotive Engineers (hereinafter "BLE"), plaintiffs herein.

(2) W. G. Taylor, K. P. Brockhoeft, A. J. Ruiz and Wayne A. Sepcich are citizens of Louisiana and the United States and reside within the judicial district for the Eastern District of Louisiana. They are employed by MoPac at its Avondale, Louisiana Yard, and have seniority in the craft of switchmen, which are sometimes referred to as "yardmen". These individuals also have first preference to transfer into the craft of locomotive firemen at MoPac's Avondale Yard from which they will be eligible for promotion into the craft of locomotive engineers. Taylor has qualified and does hold seniority as a locomotive engineer for MoPac. When business conditions are such that Taylor and other switchmen who have acquired seniority as locomotive engineers are not able to hold positions as locomotive engineers or firemen, they flow back into the craft of switchmen and work as switchmen until they can again hold a position in the craft of locomotive firemen or the craft of locomotive engineers.

(3) BLE is a labor organization and an unincorporated association with its principal offices located at 1110 Engineers Building, Cleveland, Ohio 44114. BLE represents in collective bargaining numerous employees of various "carriers", within the meaning of Section 1, first of the Railway Labor Act, 45 U.S.C. Section 151, First, and

employees of MoPac. BLE is a "representative" of "employees" within the meaning of Section 1 of the Railway Labor Act, 45 U.S.C. Section 151. Since well into the nineteenth century and up until the present, the collective bargaining representative on most of the nation's railroads, with few exceptions, has been BLE. BLE also is the collective bargaining representative for the craft of firemen on some railroads, such as the Louisville and Nashville, Long Island and Grand Trunk Western. BLE is further an organization, national in scope, and admits to membership employees in engine, train, yard and hostling service, within the meaning of Section 2, Eleventh (c) of the Railway Labor Act, 45 U.S.C. Section 152, Eleventh (c). Said membership is offered pursuant to Section 26 Statutes, Constitution and Bylaws of the International BLE, which states: "membership may also be extended to other groups of employees, when in the opinion of the International President, or Executive Committee, such action would be advantageous to the Brotherhood of Locomotive Engineers." Membership in the BLE satisfies the union shop membership requirements contained in UTU agreements. Also, BLE is qualified to appoint two labor members of the First Division of the National Railroad Adjustment Board pursuant to Section 3, First (h) of the Railway Labor Act, 45 U.S.C. Section 153, First (h). The First Division has jurisdiction over disputes involving engineers, firemen, hostlers, conductors, trainmen and switchmen.

(4) MoPac is a corporation organized and existing under and by virtue of the laws of Delaware. It is a common carrier by rail engaged in interstate operations and subject to the provisions of the Interstate Commerce Act, 49 U.S.C. Section 1, *et seq.* MoPac is subject to

federal law relating to collective bargaining, employee disputes, and employee representation matters as set forth in the Railway Labor Act. MoPac operates a line of railroad and is doing business within the judicial district for the Eastern District of Louisiana.

(5) United Transportation Union (hereinafter "UTU") is a railroad labor organization, national in scope, and organized in accordance with the provisions of the Railway Labor Act, 45 U.S.C. Section 151, *et seq.*, with its headquarters and principal offices located in Lakewood, Ohio. UTU is the duly designated collective bargaining representative pursuant to the Railway Labor Act for the crafts of switchmen and firemen employed on the MoPac. It also is the craft representative for conductors and brakemen on MoPac. UTU admits to membership and collects dues from employees working for MoPac and other carriers in Louisiana and is doing business within the judicial district for the Eastern District of Louisiana.

(6) Each of the individuals named in paragraph 2 of this affidavit has been at all time material hereto a member of BLE; some of the individuals have from time to time been members of UTU.

(7) While working as an engineer, the rates of pay, rules and working conditions for Taylor and other switchmen who have been promoted to locomotive engineers are set by agreement between BLE and MoPac. While working as switchmen, the rates of pay, rules and working conditions for those individuals are set by agreement between UTU and MoPac. On or about January 1, 1984. Taylor was furloughed as an engineer and fireman and. along with Ruiz and Sepcich, was working as a switchman.

(8) On January 13, 1984, BLE Local Chairman W. L. Lanassa sought to represent switchmen at a time claim

conference with MoPac (Exhibit 1). By letter dated January 13, 1984, K. L. Cargile, MoPac Assistant Superintendent refused the request citing Article 23 of the UTU-MoPac agreement. (Exhibit 2). The position taken by Mr. Cargile was consistent with the position taken by O. B. Sayers, MoPac Assistant Vice President, Labor Relations, in a letter dated December 30, 1983 to BLE Vice President E. E. Watson. (Exhibit 3).

(9) In or about January, 1984, Taylor, Ruiz and Sepcich were charged with possible misconduct as switchmen under the UTU-MoPac collective bargaining agreement covering switchmen and called for an investigation by MoPac. These individuals sought to have BLE Local Chairman W. L. Lanassa as their representative at the investigation. BLE Local Chairman Lanassa was advised by MoPac that neither he, nor any BLE representative, would be permitted to represent Taylor or anyone else at the investigation scheduled for February 8, 1984. (Exhibit 4). On February 8, 1984, I attended the investigation and attempted to represent Taylor, Ruiz and Sepcich and was denied the right to represent these individuals by MoPac as seen by the transcript of the proceedings. (Exhibit 5). MoPac relied on Article 18 of the UTU-MoPac agreement at this hearing and refused to permit the individuals any representatives but one from the UTU.

(10) On other occasions, in 1983 and 1984, certain of the switchmen employed by MoPac, and members of BLE, including K. P. Brockhoeft, have sought BLE representation regarding claims and grievances, and MoPac, in such cases, has refused to treat with the BLE as such representative in regard to such claims or grievances, and further in regard to their appeal or arbitration. By letter dated August 10, 1983, I took issue with the decision made by MoPac. (Exhibit 6).

(11) On or about January 1, 1974, MoPac and UTU entered into an agreement establishing terms and conditions of employment for switchmen employed by MoPac. (Exhibit "A" attached to the complaint). Among the provisions of such contract are Articles 18 and 23 dealing with discipline and grievances and representation and rulings, respectively. In addition, Section 17 of an agreement dated August 11, 1948 provides for a time limit on claims. All said rules limit and restrict representation of switchmen in handling such to the defined "duly accredited representative", which is specified to be only a UTU representative and has been so enforced by MoPac. Moreover, Section 17 provides that "all claims or grievances involved in a decision of the highest officer shall be barred unless within six months from the date of said officers' decision proceedings are instituted by the employee or his duly authorized representative before a tribunal having jurisdiction pursuant to law." MoPac supports, in part, its refusal to treat with the BLE as representative of switchmen, such as Taylor and Brockhoeft, upon said Articles 18 and 23 of the January 1, 1974 MoPac-UTU agreement and Section 17 of a MoPac-UTU agreement dated August 11, 1948.

M. L. ROYAL

Sworn to and subscribed before me this ..... day of ....., 1984.

.....

Notary Public

APPENDIX B

Affidavit of W. J. Wanke

Civil Action No. 84-700

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
Section "H"
Magistrate Division 2

W. G. TAYLOR, K. P. BROCKHOEFT, A. J. RUIZ, WAYNE A. SEPCICH and BROTHERHOOD OF LOCOMOTIVE ENGINEERS,
Plaintiffs,

vs.

MISSOURI PACIFIC RAILROAD COMPANY and UNITED TRANSPORTATION UNION,
Defendants.

AFFIDAVIT OF W. J. WANKE

STATE OF OHIO)
) SS:
COUNTY OF CUYAHOGA)

W. J. WANKE, being first duly sworn, deposes and states as follows:

1. I am First Vice President of the International Brotherhood of Locomotive Engineers ("BLE") with offices at 1365 Ontario Street, Cleveland, Ohio. In 1964, I became Director of the Research and Schedule Department of BLE, subsequently became an International Vice

President in 1969 and was elected First Vice President in June 1980. As First Vice President, I have access to the records of BLE with respect to collective bargaining agreements and representation rights.

2. Since its formation, BLE has admitted to membership engineers and firemen, which were the basic source of engineers. As early as the 1940s, BLE took into membership and represented trainmen who had been promoted into the craft of engineers on railroads that followed that line of progression like the Pacific Electric and Sacramento Northern. In 1962, BLE amended its constitution to permit any employee eligible for promotion to engineer to become a member of BLE. By 1966, the nation's railroads were beginning to seek persons for training to become engineers from sources other than firemen, such as apprentice engineers. As time went on, most of the nation's railroads found that the period for training could be reduced if the persons training for locomotive engineers, such as apprentice engineers, came from the ranks of the train service crafts (conductors, trainmen and switchmen). After becoming apprentice engineers, firemen or engineers, many of these individuals, including train service employees, became members of BLE.

As their ranks increased, a number of these engineers with rights to jobs in the train service crafts were furloughed as engineers and returned to service in their former jobs. They, however, retained their membership in BLE, and BLE represented them in their personal grievances.

3. On July 19, 1972, UTU and the National Railway Labor Conference entered into two agreements providing

for certain manning requirements for firemen and for engineer training programs for the craft of firemen. As previously indicated, the railroads were obtaining many, if not most, of their firemen from the ranks of train service employees.

4. On August 25, 1978, UTU entered into a national agreement with the National Carriers' Conference Committee of which Missouri Pacific is a member railroad. Article VIII of this agreement codified and expanded upon the carriers' practice of employing employees represented by UTU in the train service crafts as firemen, a craft also represented by UTU. In sum, Article VIII, which is attached hereto as Exhibit "A", provides for preferential transfer rights for UTU-represented train service employees into the craft of firemen and, thus, promotion rights into the craft of locomotive engineers.

5. As a result of Article VIII of the August 25, 1978 Agreement, all conductors, trainmen and switchmen are eligible for membership in BLE, since they have promotion rights to engineer and may work in the engine service crafts and from time to time in the train service crafts when work is not available for them as firemen or engineers.

6. On January 8, 1981, Mr. Fred A. Hardin, President of UTU, was asked if an engineer upon returning to service as a brakeman could satisfy the requirements of UTU's union shop agreement by paying dues to BLE. (Exhibit "B"). In a letter dated January 19, 1981, UTU President Hardin said that trainmen-engineers could satisfy the union shop agreements by belonging to either union, UTU as the craft representative for trainmen and BLE as the craft representative for engineers and, there-

fore, a permissible alternate organization. Mr. Hardin's letter is appended hereto as Exhibit "C". In fact, even if BLE were not a craft representative on MoPac, a switchman's membership therein would satisfy the statutory alternate membership provision.

7. On January 1, 1983, the National Railroad Passenger Corporation (Amtrak) began operations of passenger service in the Northeast Corridor of the United States with its own equipment and own operating crews. BLE is the collective bargaining representative for the craft of locomotive engineers. UTU is the representative for conductors and for engine attendants, a new craft or class of employees that did not previously exist. In other words, there was a new carrier with a new craft. On Amtrak, there is no connection whatsoever between the engineers, engine attendants or conductors. The agreement entered into by BLE for Amtrak engineers permits engineers to be represented only by BLE in grievances and disciplinary matters. UTU has similar agreement provisions for the crafts represented by it. On November 14, 1983, UTU and one of its members, John Peters, an Amtrak engineer, brought suit to require Amtrak to allow UTU to represent Peters in grievance handling. The complaint in this case is patterned after the complaint in *John D. Peters, et al. v. National Railroad Passenger Corp., et al.*, Case No. 83-3431, in the United States District Court for the District of Columbia, a copy of which is attached hereto as Exhibit "D".

8. The Amtrak or Peters case involved a first time contract on a new carrier so that there was no historical practice of claim handling. UTU, however, has attempted to take the same position in that case which it tries to make here.

9. The practices referred to in UTU Nelson's affidavit are not significantly different today than they were in 1968 or in 1945 or in 1934, prior to the passage of the Railway Labor Act. Other than name changes and a flow of employees throughout the operating crafts, rather than within the engine service crafts and the train service crafts, operating employees hold seniority in the various crafts, have promotion and transfer rights between UTU and BLE crafts, are organized in crafts represented by the two unions, and can belong to BLE in satisfaction of the union shop agreement covering them when working as switchmen.

10. Contrary to the inference in UTU Nelson's affidavit, the usual manner of handling grievances has nothing to do with union representation of those grievances but to the grievance steps or stages prior to submitting the claim or grievance to arbitration before the First Division of the National Railroad Adjustment Board as provided in Section 3, First of the Railway Labor Act. Section 3, First (i) of the Railway Labor Act was contained in the 1934 enactment. In 1934, railroad employees were not fully organized, and there were a number of company unions. In those instances, there was no grievance procedure with a "usual manner" of permitting any union representation. Moreover, there were eighteen crafts represented by unions other than the BLE and the predecessors of UTU, and none of those eighteen crafts had any similarity to the situation discussed by UTU's Mr. Nelson about union representation. Since there was no uniform or customary treatment of union representation in grievance handling at that time, Congress could not have been referring to that subject. Rather the theory at that time related to individual treatment. Clearly, therefore, Congress had reference to the procedural steps followed on

the individual carrier properties at that time when it used "usual manner" in the statutory provision.

/s/ W. J. WANKE
W. J. WANKE

SWORN TO and subscribed before me this 23rd day of May 1984.

/s/ HAROLD A. ROSS
Notary Public

Exhibit "C"

UNITED TRANSPORTATION UNION

FRED A. HARDIN
International President
R. R. BRYANT, CLYDE F. LANE
Assistant Presidents
JOHN H. SHEPHERD
General Secretary and Treasurer

14000 Detroit Avenue
Cleveland, Ohio 44107
Phone: 216-776-9400

1202 January 19, 1981

Mr. W. H. Pelton, GC, UTU
Norfolk and Western Railway
817 Kilbourne Street
Bellevue, OH 44811

Dear Sir and Brother:

This will acknowledge and reply to your letter of January 8, 1981 advising that you are experiencing a problem at Conneaut, Ohio, in Local 421, with several individuals who participated in and successfully completed the enginemen's training program per Article VIII of the 1978 National Agreement. You advise that after entering engine service the employees chose to leave the United Transportation Union and join the BLE but that recently they had been furloughed from engine service and under the agreement had returned to brakeman status but continued to pay dues to the BLE. You further advise that you have discussed this matter with General Chairman Voyk who advised that his International had taken the position that, since the employes in question were actually employed in engine service and joined the BLE, they could continue to pay dues to the BLE even though they returned to the rank of Brakeman.

You requested that I advise whether or not the aforementioned employes must resume paying dues to the UTU or can they continue paying to the BLE even though working as brakemen, keeping in mind that you do have a Union Shop Agreement in effect on this property. I was aware that you had a Union Shop Agreement on your property. Union Shop Agreements are authorized by a specific provision of the Railway Labor Act. The provisions of the Railway Labor Act that authorize the making of Union Shop Agreements contain language which in effect says that, if an individual (in the operating crafts, that is, engineers, firemen, conductors, brakemen and yardmen) can comply with any Union Shop Agreement by belonging to any organization national in scope, having a representative on Division One. The BLE, of course, is national in scope and has a representative on Division One. If the individuals you mentioned are members of the BLE, then that would constitute compliance with our Union Shop Agreement. The same situation would be true if these individuals elected to retain their membership in UTU while working as engineers and declined to join the ELE. It is my understanding that in the past the BLE has not admitted to membership anyone who did not have "seniority rights" to engine service. That is, they normally did not admit to membership a brakeman or conductor unless he had some seniority rights in engine service. The individuals to whom you make reference obviously have seniority rights as brakemen and also as firemen and engineers. Therefore, the position taken by the BLE is consistent with positions taken in prior years in similar situations.

In the operating crafts an employee has a choice between two unions (provided that either the two unions

will admit him to membership) to belong to in order to comply with a Union Shop Agreement. When this Union Shop provision was enacted in the early 1950's there were only isolated instances where groundmen also held seniority in engine service, therefore, the application of the provision applied mainly to situations involving the Brotherhood of Railroad Trainmen, the Order of Railway Conductors and Brakemen and the Switchmen's Union of North America. It was not uncommon prior to the formation of the UTU for groundmen to belong to different organizations on the same property. It is only since we have made some agreements permitting groundmen to transfer to engine service that we have been confronted with this problem of the individual being furloughed from engine service and resuming service as a groundman. I believe that this will be a temporary situation, however, under the law an individual in the situation you describe can belong to either organization and comply with a Union Shop Agreement.

With kindest regards, I remain

Fraternally yours,

/s/ FRED A. HARDIN
President

cc: John Sytsma, Pres., BLE
J. L. Voyk, GC-BLE
J. P. Koontz, LC-421
W. O. Weber, Sec-421